No. 17-1011

IN THE
SUPREME COURT OF THE UNITED STATES

BUDHA ISMAIL JAM, ET AL.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the D.C. Circuit

BRIEF OF INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

William J. Aceves
California Western School of Law
225 Cedar Street
San Diego, CA 92101
(619) 515-1589
wja@cwsl.edu
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE D.C. CIRCUIT'S INTERPRETATION OF THE IOIA IS INCORRECT BECAUSE IT FAILS TO EFFECTUATE A CLEAR WAIVER OF IMMUNITY 5

II. THE D.C. CIRCUIT FAILS TO RECOGNIZE THAT INTERNATIONAL ORGANIZATIONS ARE SUBJECT TO THE PRINCIPLE OF FUNCTIONAL IMMUNITY 9

III. THE D.C. CIRCUIT'S DECISION, WHICH GRANTS IMMUNITY TO THE IFC, IS CONTRARY TO THE REMEDIAL PRINCIPLES OF INTERNATIONAL LAW, INCLUDING THE RIGHT TO A REMEDY 16

CONCLUSION 21

ADDENDUM: LIST OF *AMICI CURIAE* A-1

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Abbott v. Abbott
560 U.S. 1 (2010) 13

Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.,
137 S. Ct. 1312 (2017) 8

Jam v. International Finance Corp.,
860 F.3d 703 (D.C. Cir. 2017) ..... *passim*

Murray v. Schooner Charming Betsy,
6 U.S. (2 Cranch) (1804) 5

OSS Nokalva, Inc. v. European Space Agency,
617 F.3d 756 (3d Cir. 2010). 4, 8

Sale v. Haitian Ctrs. Council,
205 U.S. 155 (1993) 13

Weinberger v. Rossi,
456 U.S. 25 (1982) 13

FEDERAL STATUTES AND RULES

International Organizations Immunities Act,
Pub. L. No. 789-291,
59 Stat. 669 (1945) ..... *passim*

22 U.S.C. § 288 ..... *passim*

28 U.S.C. § 1602 8

28 U.S.C. § 1604 8

28 U.S.C. § 1605 8

TREATIES AND INTERNATIONAL AGREEMENTS

American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 18

Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 521 15

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 18-19

IFC Articles of Agreement, May 25, 1955, 264 U.N.T.S. 118 ..... *passim*

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 17

U.N. Human Rights Comm., General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (Mar. 29, 2004) 17-18

Universal Declaration of Human Rights, 8 G.A. Res 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) 16-17

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 13

INTERNATIONAL AUTHORITIES

Durand & Ugarte, Inter-Am. Ct. H.R. (ser. C) No. 89 (Dec. 3, 2001) 18

Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 1 (Sept. 13) 16

Garrido & Baigorria, Inter-Am. Ct. H.R. (ser. C) No. 39 (Aug. 27, 1998) 18

International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries (2011) 19-20

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. Reports 73 (Dec. 20) 9, 16

Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. Reports 174 (Apr. 11). 9, 10, 16

Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 7, (July 21, 1989) 18

Waite & Kennedy v. Germany, App. No. 26083/94, 30 Eur. H.R. Rep. 261 (1999) 19

OTHER AUTHORITIES

August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 Chinese J. Int'l L. 285 (2008) 15

August Reinisch & Jakob Wurm, *International Financial Institutions before National Courts*, *in* Immunity of International Organizations 103 (Niels Blokker & Nico Schrijver eds., 2015) .. 11

Carson Young, *The Limits of International Organization Immunity*, 95 Tex. L. Rev. 889 (2017) 14

Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?*, 31 Temple Int'l & Comp. L. J. 45 (2017) 20-21

Daniel D. Bradlow & David B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions*, *in* International Financial Institutions and International Law 387 (Daniel D. Bradlow & David B. Hunter eds., 2010) 9

Dinah Shelton, Remedies in International Human Rights Law (3d ed. 2015) 16

Frederic Megret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 Hum. Rts. Q. 314 (2003) 15

Hazel Fox & Philippa Webb, The Law of State Immunity (3d ed. 2016) ..... *passim*

International Finance Corporation, IFC: The First Six Decades (2017) 6, 13

James Crawford, The International Law Commission's Articles on State Responsibility (2002). 19-20

Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L. (2016) 14

Marina Feldman, et al., *Annex VIII: International Finance Corporation (IFC), in* The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary 805 (August Reinisch ed., 2016)..... 6

Michael Wood, *Do International Organizations Enjoy Immunity under Customary International Law, in Immunity of* International Organizations 29 (Niels Blokker & Nico Schrijver eds., 2015)..... 10

Niels Blokker, *International Organizations: The Untouchables, in* Immunity of International Organizations 1 (Niels Blokker & Nico Schrijver eds., 2015)..... 10-11

Oxfam, The Suffering of Others (Apr. 2015)..... 3

Restatement (Third) of Foreign Relations Law § 115 (1987)..... 5

Steven Herz, *Rethinking International Financial Institution Immunity, in* International Financial Institutions and International Law (Daniel D. Bradlow & David B. Hunter eds., 2010) 14

INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted pursuant to Supreme Court Rule 37(2).[1] It is filed in support of the Petition for Writ of Certiorari.

Amici are legal experts in the fields of international law and human rights.[2] They teach and have written extensively on these subjects. While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law, respect for human rights, and the principles of accountability for perpetrators and redress for victims.

Amici recognize that international law no longer accepts claims of absolute immunity by states or international organizations in all cases. Instead, immunity is conditioned on various factors, including whether the relevant actor has waived immunity, the nature of the underlying claims, and

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. Counsel of Record for all parties were notified by *Amici* of their intent to file more than 10 days prior to the due date. In addition, Petitioners consented to *amicus* submissions through a blanket consent filed with the Clerk of the Court. Respondent also consented to the filing of this Brief of *Amici Curiae*.

[2] A list of the *Amici* appears in the Addendum.

the principle of functional immunity. Moreover, a grant of absolute immunity is contrary to the remedial principles of international law, which include accountability for tortfeasors and the right to a remedy for victims. For these reasons, *Amici* are deeply concerned with the D.C. Circuit's decision in *Jam v. International Finance Corp.*

Amici would like to provide the Court with their perspective on these issues. They believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

In *Jam v. International Finance Corp.*, 860 F.3d 703 (D.C. Cir. 2017), the D.C. Circuit held the International Finance Corporation ("IFC"), which is headquartered in Washington, D.C., was immune from civil liability in a case arising out of an IFC-funded project. The IFC loan of $450 million was made to a private company for the construction and operation of a power plant in India. According to Petitioners, the IFC failed to comply with its funding agreement as well as its own internal policies to prevent social and environmental damage. While the IFC "retained supervisory authority and could revoke financial support of the project," it failed to do so. *Id.* at 704. Petitioners allege the IFC's acts and omissions resulted in their community suffering catastrophic

environmental harm, thereby affecting their lives and livelihood.[3]

In considering the IFC's purported claim of absolute immunity, the D.C. Circuit incorrectly interpreted and applied the International Organizations Immunities Act ("IOIA"), Pub. L. No. 789-291, 59 Stat. 669 (1945) (codified as amended 22 U.S.C. §§ 288 *et seq*). The IOIA grants international organizations the same immunity "as is enjoyed by foreign governments." *Id.* § 288a(b). The IOIA also carves out a significant exception. Immunity applies "except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." *Id.* Notwithstanding these provisions, the D.C. Circuit offered a puzzling interpretation that treats organizational immunity as a static principle while acknowledging that state immunity has evolved since the IOIA was adopted in 1945.[4] *Jam*, 860 F.3d at 705. As a result, the D.C. Circuit disregarded the IFC's clear waiver of immunity in this case.

In explaining its puzzling decision, the D.C. Circuit acknowledged it was bound by circuit precedent regarding the scope of immunity possessed by international organizations. But, as

---

[3] For similar concerns regarding the human costs arising out of IFC projects, see Oxfam, *The Suffering of Others* (Apr. 2015).

[4] The limitations of the D.C. Circuit's interpretation are fully addressed in the Petition for Writ of Certiorari.

Judge Pillard noted in her concurring opinion, the D.C. Circuit's decisions "have left the law of international organizations' immunity in a perplexing state" and that they were "wrongly decided." *Id.* at 708 (Pillard, J., concurring).

This Court should grant certiorari and reverse the D.C. Circuit's decision for three reasons.[5] First, the IFC's governing statute clearly waives the IFC's immunity from civil process. The D.C. Circuit disregards the plain language of the IOIA and incorrectly interprets the statute, thereby absolving the IFC from its clear and firm duty to respond to this action. Second, international organizations are subject to the principle of functional immunity, which is a more limited form of immunity. Third, immunity claims must be assessed in light of the remedial principles of international law, including the right to a remedy. In sum, the D.C. Circuit's decision affords the IFC impunity for its wrongful acts, which is contrary to the entire architecture of international law.

As this Court considers the question of immunity and the applicable IOIA language, it should consider the well-known canon of statutory construction that federal law must not be interpreted in a manner that conflicts with

---

[5] There is a circuit split between the D.C. Circuit and the Third Circuit on the question of immunity for international organizations. *See OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010).

international law if any other construction is fairly possible. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *see also* Restatement (Third) of Foreign Relations Law § 114 (1987). This doctrine does not require courts to use international law to override domestic law; rather, courts are urged to harmonize domestic and international law whenever possible. This canon of statutory construction is particularly important in this case, where a federal statute requires courts to reference the IFC's constitutive treaty and consider the immunity principles that apply to international financial institutions.

For these reasons, this Court should grant the petition for certiorari and reverse the D.C. Circuit's decision.

ARGUMENT

The D.C. Circuit's decision, which exempts the IFC from civil process, misconstrues the IOIA, has no basis in the IFC's governing statute, and is contrary to international law.

I. THE D.C. CIRCUIT'S INTERPRETATION OF THE IOIA IS INCORRECT BECAUSE IT FAILS TO EFFECTUATE A CLEAR WAIVER OF IMMUNITY.

The IOIA governs the immunity of international organizations operating in the United States. While it grants these organizations immunity, it also includes a significant exception. Immunity applies

"except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b).

The IFC was established in 1956 and is a member of the World Bank Group.[6] *See generally* International Finance Corporation, IFC: The First Six Decades (2d. ed. 2017) ("IFC: The First Six Decades"). It is a specialized agency of the United Nations although it is considered a separate international organization. Unlike other members of the World Bank Group, the IFC focuses exclusively on providing financial investments to the private sector. *Id.* at 12, 27.

The IFC's Articles of Agreement constitute its governing statute.[7] IFC Articles of Agreement, May 25, 1955, 264 U.N.T.S. 118 ("Articles of

---

[6] The World Bank Group includes the International Bank for Reconstruction and Development, the International Development Association, the Multilateral Investment Guarantee Agency, the International Centre for Settlement of Investment Disputes, and the International Finance Corporation. IFC: The First Six Decades, *supra*, at 5-6.

[7] The IFC provides several forms of financial products and services, including "loans for the IFC's own account and for the account of participating financial institutions, equity and quasi-equity investments, structured finance transactions, and advisory services that support private sector development." Marina Feldman, et al., *Annex VIII: International Finance Corporation (IFC)*, *in* The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary 805, 806 (August Reinisch ed., 2016).

Agreement"). Article VI establishes the IFC's status, privileges, and immunities. Specifically, Article VI(3) provides:

> Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members.

The plain language of Article VI(3) acknowledges the IFC may be subject to civil process. The D.C. Circuit acknowledged this in its own opinion. *Jam*, 860 F.3d at 706 ("There is no question that the IFC has waived immunity for some claims. Indeed, its charter, read literally, would seem to include a categorical waiver.").

Despite the definitive nature of the IFC's waiver in its governing statute, the D.C. Circuit chose to rely on circuit precedent for a contrary interpretation even though it recognized its interpretation was "a bit strange." *Id.* at 707. This was clear error.

It is instructive to consider how the D.C. Circuit's approach to organizational immunity in the IOIA compares to the more limited concept of sovereign immunity. In the United States, the Foreign Sovereign Immunities Act ("FSIA") codifies the restrictive theory of sovereign immunity for foreign states and allows for some civil actions, including certain torts and claims arising out of

commercial activities. 28 U.S.C. §§ 1602, 1604, 1605; *see generally Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) (FSIA "embodies basic principles of international law long followed both in the United States and elsewhere."). It would be puzzling for an international organization to receive greater protection from civil process under U.S. law than what is provided to foreign states for similar claims. *See* Hazel Fox & Philippa Webb, The Law of State Immunity 578 (3d ed. 2016) (noting the incongruity of granting absolute immunity to international organizations in comparison to the restricted immunity enjoyed by states). In fact, such an interpretation would create a perverse "incentive for foreign governments to evade legal obligations by acting through international organizations." *OSS Nokalva, Inc.*, 617 F.3d at 764.

This reason alone undermines the D.C. Circuit's puzzling approach to immunity in this case—an approach that treats organizational immunity as a static principle while acknowledging that state immunity has evolved since the IOIA was adopted in 1945. *Jam*, 860 F.3d at 705 (rejecting an evolving notion of international organizational immunity while recognizing that sovereign immunity has evolved).

II. THE D.C. CIRCUIT FAILS TO RECOGNIZE THAT INTERNATIONAL ORGANIZATIONS ARE SUBJECT TO THE PRINCIPLE OF FUNCTIONAL IMMUNITY.

The IFC is a subject of international law.[8] And, as a subject, it is "capable of possessing international rights and duties . . . ." *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. Reports 174, 179 (Apr. 11). Accordingly, the IFC has a clear obligation to comply with the substantive requirements of international law. The International Court of Justice ("ICJ") has indicated that "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law. . . ." *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 I.C.J. Reports 73, 89-90 (Dec. 20).

While international organizations are subjects of international law, there are significant distinctions between states and international

---

[8] Daniel D. Bradlow & David B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions*, *in* International Financial Institutions and International Law 387, 389 (Daniel D. Bradlow & David B. Hunter eds., 2010) ("[I]t is clear that the IFIs [international financial institutions], like all inter-governmental organizations, are subjects of international law. As such, their status, powers, and responsibilities are defined by the treaties that create them—in the case of the IFIs, their Articles of Agreement.").

organizations. *See Reparation for Injuries Suffered in the Service of the United Nations,* 1949 I.C.J. Reports at 180 ("Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."). These distinctions are evident in the area of immunity.

It has long been recognized that state immunity is different from organizational immunity. Fox & Webb, *supra,* at 570-71. "[W]hile States have general powers, rights and responsibilities, international organizations' powers and responsibility are defined by their functions and purposes, as set out in their constituent instrument and as implemented in practice." [9] *Id.* at 571. The functions of the organization determine the scope of their immunity. Accordingly, the principle of functional immunity is now used to assess the immunity of international organizations. Niels Blokker, *International Organizations: The Untouchables, in* Immunity of International

---

[9] Customary international law does not address the status of organizational immunity. Michael Wood, *Do International Organizations Enjoy Immunity under Customary International Law, in* Immunity of International Organizations 29 (Niels Blokker & Nico Schrijver eds., 2015). Accordingly, reliance on an organization's constitutive instrument is necessary to determine the scope of such immunity.

Organizations 1, 2 (Niels Blokker & Nico Schrijver eds., 2015).

The principle of functional immunity is even more relevant in the case of international financial institutions such as the IFC.[10] Because of their unique status, international financial institutions must waive their immunity in order to do business.

> International financial institutions . . . are in a special category: their purpose being essentially to lend and borrow, their constituent instruments contain broad waivers in favour of third party transactions in order to attract lender confidence. This waiver tends to pertain to suits by private parties, not Member States.

Fox & Webb, *supra*, at 577.

The IFC Articles of Agreement granted the IFC "full juridical personality," which included the capacity: "(i) to contract; (ii) to acquire and dispose of immovable and movable property; [and] (iii) to institute legal proceedings." Articles of Agreement, art. VI(2). To enable the IFC "to fulfill the functions with which it is entrusted," the Articles of Agreement also waived IFC immunity from civil process while keeping other institutional privileges intact. *Id.* arts. VI(1), VI(3). This is consistent with the principle of functional immunity.

---

[10] *Cf.* August Reinisch & Jakob Wurm, *International Financial Institutions before National Courts*, *in* Immunity of International Organizations 103, 105 (Niels Blokker & Nico Schrijver eds., 2015).

Article VI(3) of the Articles of Agreement indicates that "[a]ctions may be brought against the Corporation . . . ." The ordinary meaning of this provision is to allow for civil process against the IFC. Article VI(3) includes one condition and one exception, neither of which preclude this case from proceeding. Actions may only be brought against the Corporation "in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities." *Id.* And, no actions shall "be brought by members or persons acting for or deriving claims from members." *Id.* In sum, the IFC has waived any possible claims of immunity.

This interpretation is bolstered by the remaining provisions of Article VI, which make it abundantly clear the drafters knew how to establish immunity for selected IFC operations and personnel. For example, Section 4 provides immunity of IFC assets from seizure. Section 5 provides immunity of IFC archives. Section 8 provides for immunities and privileges of IFC officers and employees. Section 9 provides the IFC immunities from taxation. In contrast, Section 3 provides no such immunity regarding the position of the IFC itself with regard to civil process.

This plain language interpretation of the IFC's Articles of Agreement is also reinforced by the treaty's "object and purpose" and the practical

ramifications of a different interpretation.[11] The IFC is the only member of the World Bank Group that exclusively serves the private sector, and this work is performed without any government guarantees. IFC: The First Six Decades, *supra*, at 27. The IFC's purpose is "to further economic development by encouraging the growth of productive private enterprise in member countries." Articles of Agreement, art. I. To carry out this purpose, the IFC Articles of Agreement indicate the IFC shall "seek to stimulate, and to help create conditions conducive to, the flow of private capital, domestic and foreign, into productive investment in member countries." *Id.* art. I(iii).

To enable the IFC to fulfill these functions, the Articles of Agreement clarify the IFC's legal status and its amenability to civil process. Article VI(2) provides the IFC "shall possess full juridical

---

[11] Under the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"). U.S. courts consistently look to the Vienna Convention as an authoritative guide when interpreting international instruments and resolving potential ambiguities in treaty terms. *See Abbott v. Abbott*, 560 U.S. 1, 40 (2010) (relying on the Vienna Convention to aid in the interpretation of treaty provisions); *Sale v. Haitian Ctrs. Council*, 205 U.S. 155, 191, 194-195 (1993) (relying on the Vienna Convention as evidence of "well-settled" rules of interpretation); *Weinberger v. Rossi*, 456 U.S. 25, 30 (1982) (citing the Vienna Convention in discussing the meaning of "treaty" under international law).

personality and in, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings." In addition, Article VI(3) waives the IFC's immunity from civil process.

The IFC would simply be unable to function in financial markets if it was not amenable to civil process. Private sector actors would be unlikely to engage with an organization that could not be held accountable for its misdeeds. A regime of absolute liability would weaken respect for the rule of law and due process, thereby undermining the IFC's goal of creating conditions conducive to the flow of private capital and investment. Thus, the IFC's waiver of immunity serves the organization by supporting the rule of law, promoting accountability, and providing redress to individuals who have been harmed by its actions. *See generally* Carson Young, *The Limits of International Organization Immunity*, 95 Tex. L. Rev. 889, 905-08 (2017) (addressing the benefits that accrue through restrictive immunity); Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L. 341, 362-74 (2016) (addressing the arguments against absolute immunity); Steven Herz, *Rethinking International Financial Institution Immunity*, *in* International Financial Institutions and International Law 137, 138 (Daniel D. Bradlow & David B. Hunter eds., 2010) (describing the reasons for limited immunity). The harmful consequences associated with immunity are evident in this case, which involves an alleged tort in a private-sector project.

The IFC's immunity waiver is also consistent with the Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 521. Article IX(31) recognizes that U.N. specialized agencies have an obligation to provide "appropriate modes of settlement" for disputes arising from their contractual arrangements and for "other disputes of a private law character." *Id.* art. IX(31). The failure of a specialized agency to provide an "appropriate mode of settlement" would undermine that agency's claim to immunity.[12] By expressly waiving its immunity from civil process, the IFC fulfilled this obligation.

In sum, international organizations are governed by the principle of functional immunity. The D.C. Circuit's decision is contrary to this more restrictive theory of immunity.

---

[12] *See* August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 Chinese J. Int'l L. 285, 305 (2008) ("The notion that the jurisdictional immunity enjoyed by international organizations may depend upon the availability of 'reasonable alternative means to protect effectively' the rights of those affected by their activities . . . is increasingly accepted by a number of national courts, in particular, in Europe."). *See also* Frederic Megret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 Hum. Rts. Q. 314 (2003).

III. THE D.C. CIRCUIT'S DECISION, WHICH GRANTS IMMUNITY TO THE IFC, IS CONTRARY TO THE REMEDIAL PRINCIPLES OF INTERNATIONAL LAW, INCLUDING THE RIGHT TO A REMEDY.

As a subject of international law, the IFC is bound by the general rules of international law. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. Reports at 179; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 I.C.J. Reports at 89-90. This includes the principle of *ubi ius ibi remedium*—"where there is a right, there is a remedy."

The seminal formulation of this fundamental principle comes from the 1928 holding of the Permanent Court of International Justice ("PCIJ") in the *Factory at Chorzów* case. "[I]t is a principle of international law, and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation.*" *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (emphasis added). The remedial principles governing human rights law are heavily influenced by the *Factory at Chorzów*. *See* Dinah Shelton, Remedies in International Human Rights Law 377 (3d ed. 2015).

The right to a remedy is codified in several treaties and has now attained the status of customary international law. It was first set forth in the influential Universal Declaration of Human Rights, G.A. Res 217A (III), U.N. Doc. A/810 at 71

(Dec. 10, 1948). Article 8 provides "[e]veryone has the right to an effective remedy . . . for acts violating the fundamental rights granted him . . . .").

The International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"), which the United States has signed and ratified, obligates States Parties to provide effective remedies for violations. For example, Article 2(3) provides:

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Id. art. 2(3).

The Human Rights Committee, which oversees States' compliance with the ICCPR, emphasizes that remedies must not just be available in theory but that "States Parties must ensure that individuals . . . have ***accessible and effective remedies*** to vindicate" their rights. U.N. Human Rights Comm., General Comment No. 31 on the

Nature of the General Legal Obligation Imposed on States Parties to the Covenant [ICCPR], ¶ 15, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (Mar. 29, 2004) (emphasis added).

In addition, regional human rights agreements recognize the right to a remedy. These treaties reinforce the status of the right to a remedy as a principle of customary international law.

For example, the American Convention provides that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention . . . ." American Convention on Human Rights art. 25(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. In *Velásquez Rodríguez v. Honduras* Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 10 (July 21, 1989), the Inter-American Court of Human Rights issued a seminal decision on the right to a remedy. According to the Inter-American Court, "every violation of an international obligation which results in harm creates a duty to make adequate reparation." *Id.*; *see also Garrido & Baigorria*, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶¶ 39-45 (Aug. 27, 1998); *accord Durand & Ugarte*, Inter-Am. Ct. H.R. (ser. C) No. 89, ¶ 24 (Dec. 3, 2001) ("[A]ny violation of an international obligation carries with it the obligation to make adequate reparation.").

The European human rights system also recognizes the right to a remedy. European Convention for the Protection of Human Rights and

Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."). The right to a remedy is also implicated by Article 6 of the European Convention, which addresses the right of access to the courts. In *Waite & Kennedy v. Germany*, App. No. 26083/94, 30 Eur. H.R. Rep. 261 (1999), the European Court of Human Rights assessed an international organization's claim of immunity by reference to Article 6. According to the European Court, a material factor in determining whether immunity "is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention." *Id.* ¶ 68.

International organizations are bound by these principles. The Draft Articles on the Responsibility of International Organizations were adopted by the International Law Commission in 2011 and offer a detailed analysis regarding the rights and obligations of international organizations. [13]

---

[13] The International Law Commission was established by the U.N. General Assembly to assist in the codification of international law. Its work has led to the adoption of numerous treaties. The Draft Articles on the Responsibility of International Organizations are patterned after the well-regarded Draft Articles on Responsibility of States for Internationally Wrongful Acts. *See generally* James

International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries (2011) ("ILC Draft Articles"). At the outset, the Draft Articles provide that "[e]very internationally wrongful act of an international organization entails the international responsibility of that organization." *Id.* art. 3. Once liability has been established, "[t]he responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act." *Id.* art. 31(1). Such injuries include "any damage, whether material or moral, caused by the internationally wrongful act of an international organization." *Id.* art. 31(2). Reparations "shall take the form of restitution, compensation and satisfaction, either singly or in combination . . . ." *Id.* art. 34.

In sum, "[t]he fact that the right to an effective remedy is recognized as a principle of customary international law means that it is a legally binding obligation on all subjects of international law," including the IFC. Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?*, 31 Temple Int'l & Comp. L. J. 45, 61 (2017). Accordingly, international organizations "should only have immunity from suit if they can demonstrate that they are offering an internationally legally compliant effective remedy to all their stakeholders." *Id.* at 68. If they

---

Crawford, The International Law Commission's Articles on State Responsibility (2002).

cannot do so, "they should lose their immunity and the relevant court should hear the case against them." *Id.*

CONCLUSION

For these reasons, this Court should grant the petition for certiorari and reverse the D.C. Circuit's decision.

Respectfully submitted, February 21, 2018

William J. Aceves
California Western School of Law
225 Cedar Street
San Diego, CA 92101
(619) 515-1589
wja@cwsl.edu

Counsel for *Amici Curiae*

ADDENDUM:
LIST OF *AMICI CURIAE* [1]

Arturo J. Carrillo
Professor of Law
Director of the International Human Rights Clinic
The George Washington School of Law

Sarah Dávila-Ruhaak
Director, International Human Rights Clinic
The John Marshall Law School

Martin Flaherty
Leitner Family Professor of International Human Rights Law
Founding Co-Director, Leitner Center of International Law and Justice
Fordham Law School

Hurst Hannum
Professor of International Law
Fletcher School of Law and Diplomacy
Tufts University

---

[1] Affiliations are only provided for identification purposes.

Naomi Roht-Arriaza
Albert Abramson '54 Distinguished Professor
of Law
University of California, Hastings College of the
Law

Gabor Rona
Visiting Professor of Law
Cardozo Law School

Beth Stephens
Distinguished Professor of Law
Rutgers Law School

Connie de la Vega
Marshall P. Madison Professor of Law
and Dean's Circle Scholar
Academic Director of International Programs
University of San Francisco School of Law